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CONCURRING OPINION BY ACOBA, J.

While I join in the majority,<sup>1</sup> I write separately because, with all due respect, the dissent's qualification of the "prosecutorial misconduct" test would distort the function assigned prosecutors under our system. As stated in the majority opinion, the fact is that "prosecutorial misconduct" is a broad term long employed in our cases. While the cases may, but do not always involve "bad faith or [an] inflammatory act" or necessarily an express violation of the Hawai'i Rules of Professional Conduct, they encompass these and other instances of error. As justification for a change in the use of the term, the dissent raises the specter of disciplinary measures. However,

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<sup>1</sup> The majority holds that "the prosecution may not ask a defendant to comment on another witness's veracity." Majority opinion at 10. This holding is consistent with the following ABA Standards for Criminal Justice: Prosecution Function and Defense Function (3d ed. 1993) that, on their faces, state:

A prosecutor should not knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury.

. . . .  
A prosecutor should not ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.

. . . .  
The prosecutor should not intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

ABA Standards 3-5.6(b); 3-5.7(d); 3-5.9 (emphases added).

The ABA Standards are instructive in this case. While they "are not intended to be used as criteria for the judicial evaluation of alleged misconduct of the prosecutor to determine the validity of a conviction[, t]hey may or may not be relevant in such judicial evaluation, depending upon all of the circumstances." ABA Standards 3-1.1.

the record is devoid of any basis upon which to rest this speculation and there is no indication that disciplinary sanctions have been the common consequence of prosecutorial error. See State v. Dowsett, 10 Haw. App. 491, 496, 878 P.2d 739, 742 (1994) ("Defendant complains that in 'case after case reversed by the appellate courts . . . no action is ever taken against the offending prosecutors.' He relates that the effect of reversal is that the State 'gets to retry the accused.'" (Brackets omitted.)).<sup>2</sup>

But more importantly, that the prosecution must be held to a standard higher than "good faith" is a proposition long established and fundamental to the prosecution's role in the criminal law system. The prosecutor's obligation is to do justice and not simply to convict. See State v. Wong, 97 Hawai'i 512, 527, 40 P.3d 914, 929 (2002) (recognizing "the State's strong interest in prosecuting crime, but . . . [being] equally cognizant that the State's duty is to pursue justice, not convictions, and the prosecutor has a duty to act as a minister of justice to pursue prosecutions by fair means"); ABA Standards 3-1.2(c) ("The duty of the prosecutor is to seek justice, not

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<sup>2</sup> In this regard, the ABA Standards state that "[t]he prosecution function should be performed by a public prosecutor who is a lawyer subject to the standards of professional conduct and discipline," ABA Standards 3-2.1, and "[i]t is the duty of the prosecutor to know and be guided by the standards of professional conduct as defined by applicable professional traditions, ethical codes, and [the] law in the prosecutor's jurisdiction." ABA Standards 3-1.2(e) (emphasis added). In light of these standards, exigencies of trial and purported "judgment calls" made "under the stress and pressure of trial," State v. McElroy, 105 Hawai'i 379, 392, 98 P.3d 250, 263 (App. 2004) (Nakamura, J., dissenting), cannot be a legal refuge from professional duties and obligations.

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merely to convict.") When sight of this duty is lost, the level of prosecutorial advocacy is depressed. And, the dispensation of justice in our state suffers. We should not fail to remember that the high regard in which the prosecutor is held rests on his or her position as the representative of the people. Because of that position, wide discretion has been vested in the prosecutor in the prosecution of cases and vast public resources have been allocated to the tasks assigned that office. Consequently, as the United States Supreme Court has said, the prosecutor is not to be viewed or treated as merely an advocate:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88, (1935) (emphases added). In this context, the United States Supreme Court has reiterated that justice is the objective to be achieved in our courts and such justice must be accomplished "irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963). Hence,

[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for

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the federal domain: "The United States wins its point whenever justice is done its citizens in the courts."

Id.

As the Solicitor General of the United States has said,

[t]he Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory but to establish justice. We are constantly reminded of the now classic words penned by one of my illustrious predecessors, Frederick William Lehmann, that the Government wins its point when justice is done in its courts.

Id. at 87 n.2. Again, this court has reiterated that view: "The

prosecution has a duty 'to seek justice, to exercise the highest good faith in the interest of the public and to avoid even the appearance of unfair advantage over the accused.'" State v.

Moriwaki, 71 Haw. 347, 354, 791 P.2d 392, 396 (1990) (quoting

State v. Quelnan, 70 Haw. 194, 198, 746 P.2d 243, 246 (1989)).

Rather than enhance the standard of competence and professionalism expected of prosecutors, an approach which reduces or qualifies in some way the standard of conduct to that of intentional wrongdoing or bad faith diminishes the office of the prosecutor and signals a dangerous departure from the obligations society demands of its prosecutors.

